

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re:) 1998 OAL Determination No. 16
Request for Regulatory)
Determination filed by) [Docket No. 91-014]
RICHARD GOBEL for W.H.)
SMITH concerning) August 17, 1998
"Protest Hearings)
Information Sheet" issued) Determination Pursuant to
by the FRANCHISE TAX) Government Code Section 11340.5;
BOARD) Title 1, California Code of
Regulations,
Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether a "Protest Hearings Information Sheet" issued by the Franchise Tax Board is a "regulation," and, is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the Information Sheet contains "regulations" required to be adopted pursuant to the APA and restatements of existing law which are not required to be adopted pursuant to the APA.

ISSUE

The Office of Administrative Law ("OAL") has been requested to determine¹, whether the "Protest Hearings Information Sheet" ("information sheet") (one marked "FTB 1037, New 1/83," and one not labeled), which provides information and rules related to hearings requested by taxpayers, issued by the Franchise Tax Board ("FTB") is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").^{2, 3}

ANALYSIS

I. BACKGROUND

A. The State Agency and Rulemaking Authority

"There is in the state government, . . . , a Franchise Tax Board consisting of the State Controller, the Director of Finance and the Chairman of the State Board of Equalization. . . ."⁴

The Franchise Tax Board has the power and duty to administer the taxes imposed by the Income Tax and Bank and Corporation Tax Law.⁵ A part of that duty is to allow taxpayers to protest deficiencies--either in writing or by requesting oral hearings.⁶

B. This Request for Determination

This request for determination was brought by Richard Gobel for W.H. Smith ("requester"). The requester asks for a determination concerning rules which govern oral protest hearings, which give taxpayers an opportunity to show that the FTB's proposed assessment of additional tax is incorrect. The challenged rule is a one-page "Protest Hearings Information Sheet,"⁷ which is attached to this determination as Appendix "A," following the endnotes. The requester queries whether the FTB must adopt the Information Sheet pursuant to the APA.

On May 22, 1998, OAL published a summary of this request for determination in the California Regulatory Notice Register,⁸ along with a notice inviting public comment.

On July 3, 1998 the Franchise Tax Board responded to the request. The FTB contends that the Information Sheet merely restates existing law, and, therefore, is not a "regulation." FTB also contends that the "information sheet" is a form, and, is therefore, exempt from the APA.

II. DISCUSSION

A. IS THE APA GENERALLY APPLICABLE TO THE FRANCHISE TAX BOARD?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

"As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, *board*, and commission." [Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."⁹ The FTB is in neither the judicial nor legislative branch of state government.¹⁰ Clearly, the FTB is a "state agency" within the meaning of the APA.

The Franchise Tax Board has the authority to prescribe all rules and regulations necessary to enforce Part 10.2 of the Revenue and Taxation Code, which includes the statute to which the challenged rule relates.¹¹

B. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

In part, Government Code section 11342, subdivision (g), defines "regulation" as follows:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement,

interpret, or make specific the law enforced or administered by it, or to govern its procedure”

Government Code Section 11340.5, subdivision (a), provides as follows:

“No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ‘regulation’ as defined in subdivision (g) of Section 11342 unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . .”

In *Grier v. Kizer*,¹² the California Court of Appeal upheld OAL's two-part test¹³ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, OAL must conclude that it is *not* a “regulation” and *not* subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

“. . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]”¹⁴

State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission) (“SWRCB” v. OAL”) (1993)¹⁵ made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

“... [The ... Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated ‘regulations’ by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* ...” (Emphasis added.)¹⁶

The fact that FTB identifies the document as an “information sheet” is not dispositive on the issue of whether the contents are “regulations.” The contents must be considered in light of the two-part analysis described in *Grier*, above. The Information Sheet is divided into five parts: General Information, Conduct of the Hearing, Who May Attend, Recording of Hearings, and Requests to Examine Files or Obtain Copies.

1. First, is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

For an agency policy to be of “general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, **kind** or order.¹⁷ The Information Sheet is expressly intended to guide all taxpayers who choose to request an oral protest hearing. For instance, taxpayers are told **under** the heading “Recording of Hearings,” that persons attending the hearing may make written notes or audiotape recordings of the proceeding, but that photographs and videotape recordings are not permitted. The prohibition on videotaping of hearings is a clear standard of general application.

Therefore, the Information Sheet, giving taxpayers the rules concerning the conduct of the oral protest hearing which they have requested, is a standard of general application.

2. Second, has the challenged rule been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?

Having established that the information sheet is a rule of general application, OAL must determine if the information sheet interprets, implements or makes **specific** a law enforced or administered by FTB.¹⁸ In its response to the request, FTB argues that the challenged rule does not interpret, implement, or make specific any law, but rather does no more than restate existing law.

California Court of Appeal cases provide guidance on the proper approach to **take** when assessing claims that agency rules are *not* subject to the APA because **they** merely restate the law. According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in:

“[a] *statutory scheme* which the Legislature has established. . . .”¹⁹

“But to the extent any of the [agency rules] depart from, or *embellish upon* express statutory authorization and language, the [agency] will need to promulgate regulations”²⁰ [Emphasis added.]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) can be restated, but not “embellished upon” in administrative bulletins.²¹

Union of American Physicians and Dentists v. Kizer (1990)²² describes in general the limits on a state agency’s issuance of rules which have not been processed under the APA. The Department of Health Services asserted that the bulletin was not a regulation subject to the APA because (1) the bulletin’s stated purpose was to *supplement* information in a duly adopted regulation and to *help clarify* billing guidelines and (2) the challenged documentation requirements were *simply informational* in nature and did not seek to substantially regulate behavior.²³ The court held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation.²⁴

The statute being enforced in this instance by the FTB (Revenue and Taxation Code section 1559) merely provides that if a protest is filed, the FTB shall reconsider the assessment and grant an oral hearing, and may act on the protest in whole or in part. The statute does not prescribe the detailed procedures contained in the information sheet, such as rules concerning conduct of the hearing, who may attend, recording of hearings or requests to examine files or obtain copies.

(See Appendix "A"). For instance, anyone in attendance at the hearing is permitted to make audio recordings of the hearings, but may not photograph or videotape the hearing.

Prohibition on Videotaping of Hearing

The Information Sheet states:

"Anyone attending a hearing is permitted to make written notes and/or audio recordings of the hearing. Photography or *video recording is not permitted.*" (Emphasis added.)

Is this prohibition of videotaping merely a restatement of existing law? Or, **does it** implement, interpret, or make specific a law that FTB enforces?

The FTB argues generally that the Information Sheet:

"*merely summarizes* the general legal requirements to which the Franchise Tax Board is subject under various provisions of the Revenue and Taxation Code in conducting oral protest hearings." (Emphasis added.)²⁵

For instance, the statute states:

"(b) The hearing may be *recorded* only if prior notice is given to the taxpayer and the taxpayer is entitled to receive a *copy of the recording.*" (Emphasis added.)²⁶

The issue, thus, is whether the videotaping prohibition does no more than restate this statute. A key issue in making this determination is to whom the directives in (1) the statute and (2) the Information Sheet are addressed.

The statute seems to be referring primarily or solely to recordings made by the FTB, not by others. The information sheet, on the other hand, provides that "anyone attending the hearing" may make written notes or audio recordings, but prohibits photographs or video recording. The Information Sheet does not make clear whether the term "anyone" is intended to encompass FTB staff as well as taxpayers. Insofar as the Information Sheet is understood to provide notice to taxpayers that the hearing may be recorded, it may well carry out the statutory mandate that taxpayers be given prior notice if the hearing is to be recorded. To

the extent that the Sheet merely provides the mandated notice, it would not constitute an interpretation of the statute. However, the Information Sheet goes on to specify *which* kinds of recordings are permissible, clearly prohibiting videotaping of the event by the taxpayer. This clear prohibition on taxpayer videotaping of the hearing implements, interprets and make specific the Revenue and Taxation Code sections dealing with oral protest hearings.²⁷

Time and Place of the Hearing

The FTB's response claims that the information sheet is only restating the Taxpayer's Bill of Rights, Revenue and Taxation Code section 21011, subdivision (a), which provides that:

"Any hearing shall be held at a reasonable time at a board office which is convenient to the taxpayer when possible."

The information sheet says that:

"hearings are scheduled as soon as possible after they are requested, depending on the department's workload and the schedule of the individual hearing officers. . . normally . . . in the Franchise Tax Board's district office nearest to the taxpayer's residence or place of business."

Although the statement is very close to the statute, in fact it makes the vague term "reasonable" specific by stating that the hearing will be as soon as possible within the workload and schedule demands of hearing officers. Another possible interpretation of "reasonable" could be that a hearing will be scheduled within a certain number of days, months, etc., a rule that would authorize consideration of staff workload.

Designation of Agent; Disclosure of Confidential Information; Responsibility for Conduct of Those Attending on Taxpayer's Behalf

As an example of a restatement of law, the FTB refers to the part of the statute which contains various provisions governing disclosure of confidential taxpayer information²⁸ and to Revenue and Taxation Code section 21011 which provides that:

“(c) The taxpayer shall be informed prior to any hearing that he or she *has a right to have present* at the hearing his or her *designated agent*.”
(Emphasis added.)

Although the information sheet does not directly state that the taxpayer has a **right** to have a designated agent present, it does make clear that the taxpayer can **have** an “. . . officer or representative, witness. . .” present at the hearing. To the **extent** that the Sheet merely complies with the statutory mandate of informing the taxpayer of the right to have a designated agency, the Sheet does no more than restate existing law. However, the information sheet does not stop with that restatement of the law but goes on to: (1) restrict observers to available seating capacity; (2) require that all persons identify themselves, whether confidential information comes up or not, and (3) make the taxpayer responsible for the behavior of everyone who appears on the taxpayer’s behalf.

The consequence of poor behavior on the part of the taxpayer, representative, witness, or observer is to terminate the taxpayer’s hearing. Although this **action is** a typical power of a hearing officer under certain conditions, there is nothing in the FTB statutes that specifically provides that a taxpayer’s hearing shall be curtailed due to inappropriate behavior. These requirements go beyond restating Revenue and Taxation Code sections 21011 and sections 19542-19568. They interpret, implement, and make specific the statute.

Physical Custody of Files

The FTB further indicated that the information sheet simply restates Revenue and Taxation Code section 19542, which requires FTB to keep physical custody of the files in order to maintain confidentiality, and, therefore, is not a “regulation.” OAL agrees that provision of the information sheet is a restatement.

However, the other provisions in the information sheet, which implement the intent of the statute, do not merely restate the law, but rather go on to make it specific.

FTB argued that several specific parts of the Sheet did no more than restate existing law. In each case, FTB cited the existing law. We have dealt, in turn, with each of these specific arguments. FTB also argued generally that the remainder of the Sheet was no more than a restatement. OAL has not identified any additional parts of the Sheet that constitute restatements. We assume that if

any additional provisions merely reiterated existing law, that these provisions and laws would have been set out in the agency response.

The challenged information sheet contains many "regulations" which implement, interpret, make specific the statute enforced by the FTB, as well as some restatements of the law.

**C. DO THE CHALLENGED RULES FOUND TO BE
"REGULATIONS" FALL WITHIN ANY ESTABLISHED
GENERAL EXCEPTION TO APA REQUIREMENTS?**

All "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute,²⁹ as discussed above, or unless the conditions of a general exception are met. The FTB argues that the sheet is not a regulation "since [it] falls within the scope of the 'forms' exception in Government Code section 11342, subdivision (g). . ."

Government Code section 11342, subdivision (g), excludes from the definition of "regulation":

"any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." (Emphasis added.)

The FTB document described by the agency as a "form" (see Appendix "a") contains several paragraphs providing information. There are no blanks or boxes to fill out; it is not a document to be completed and returned.

The Department takes the position that the sheet is a form because it merely summarizes what is in the statutes, and that, as a form, it falls within the forms exception to the APA. However, OAL concluded above that the material in the sheet does not exclusively restate the law. Some material interprets, implements, and makes specific the statute, and consequently is regulatory. Regulatory material in forms is not exempt from the APA, as explained below.

In advising persons of their rights and responsibilities pursuant to Revenue and Taxation Code section 19044, the Board has used the sheet to inform the taxpayer about the "substance" of the conduct of the hearing. In the vernacular, a "form" is

something to be filled out according to instructions. A "form" is not typically an informative document. Instructions, which tell how to complete a "form" may accompany it, but the sheet in this instance is neither a form to be filled out, nor an instruction on how to complete a form.

Government Code section 11342, subdivision (g), includes in the definition of "regulation" a restriction on the use of the "form" exception. The limits to the "form" exception have been covered in a previous determination:³⁰

"According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a 'statutory exemption relating to *operational forms*.' (Emphasis added.)³¹ An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."

"By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is '*needed to implement the law under which the form is issued*.' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"

"In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements."

"In sharp contrast, the Agency Response reads section 11342 as exempting from the APA 'any' form prescribed by a state agency. This reading of section 11342 is too broad."

An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in such a way as to free agencies from all APA compliance responsibilities.


Therefore, even if the information sheet were treated as a "form," it contains "uniform substantive" rules to implement the statute, which must be adopted independently pursuant to the APA. To the extent the provisions in the information sheet simply restate what is in statute, case law or regulation and the Department can point to those laws, the information sheet is not subject to the APA.

III. CONCLUSION

For the reasons set forth above, OAL finds that:^{32 33}

- (1) The FTB is generally subject to the APA and its rules must be adopted pursuant to the Administrative Procedure Act;
- (2) The challenged "Protest Hearings Information Sheet" contains "regulations" as defined in the key provision of Government Code section 11342, subdivision (g);
- (3) Those "regulations" violate Government Code section 11340.5, subdivision (a), and, are therefore, invalid and unenforceable.
- (4) The Information Sheet contains, in addition to "regulations," restatements of existing law that do no violate Government Code section 11340.5.

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ENDNOTES

1. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)--yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

2. This determination may be cited as "1998 OAL Determination No. 16."

3. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the *Administrative Procedure Act*." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

4. Government Code section 15700.

5. Revenue and Taxation Code section 19503:

“(a) The Franchise Tax Board shall prescribe all rules and regulations necessary for the enforcement of Part 10 (commencing with Section 17001)[Personal Income Tax], Part 10.7 (commencing with Section 21001)[Taxpayers’ Bill of Rights], Part 11 (commencing with Section 23001)[Bank and Corporation Tax Law], and this part [Part 10.2, Administration of Franchise and Income Tax laws] and may prescribe the extent to which any ruling [* * * or regulation] (*including any judicial decision or any administrative determination other than by regulation*) shall be applied without retroactive effect”.

“(b)(1) Except as otherwise provided in this subdivision, no regulation relating to Part 10 (commencing with Section 17001), Part 10.7 (commencing with Section 21001), Part 11 (commencing with Section 23001), or this part shall apply to any taxable or income year ending before the date on which any notice substantially describing the expected contents of any regulation is issued to the public.

(2) Paragraph (1) shall not apply to either of the following:

(A) Regulations issued within 24 months of the date of the enactment of the statutory provision to which the regulation relates.

(B) Regulations issued within 24 months of the date that temporary or final federal regulations with respect to statutory provisions to which California conforms are filed with the Federal Register.

(3) The Franchise Tax Board may provide that any regulation may take effect or apply retroactively to prevent abuse.

(4) The Franchise Tax Board may provide that any regulation may apply retroactively to correct a procedural defect in the issuance of any prior regulation.

(5) The limitation of paragraph (1) shall not apply to any regulation relating to the Franchise Tax Board’s policies, practices, or procedures.

(6) The limitation of paragraph (1) may be superseded by a legislative grant of authority to the Franchise Tax Board to prescribe the effective date with respect to any regulation.

(7) The Franchise Tax Board may provide for any taxpayer to elect to apply any regulation before the dates specified in paragraph (1).

c) The amendments made by the act adding this subdivision are operative with respect to regulations which relate to California statutory provisions enacted on

or after January 1, 1998."

Stats. 1993, c. 31, section 26 eff. June 15, 1993, operative on January 1, 1994.) Italics reflect the amendments by Stats. 1997, c. 600 (A.B. 713), § 12.) Brackets indicate additions by OAL.

The statute cited above was derived from Revenue and Taxation Code sections 19253 and 26422, which apparently were in effect when this request was filed. The texts follow.

Revenue and Taxation code section 19253:

"The Franchise Tax Board shall prescribe all rules and regulations necessary for the enforcement of this part and may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect."

Revenue and Taxation Code section 26422:

"The Franchise Tax Board shall have the power and it shall be its duty to administer this part. It shall prescribe all such rules and regulations as are necessary and reasonable to carry out the provisions of this part and may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect."

Revenue and Taxation Code section 23004:

"Whenever this part [Bank and Corporation Tax law] refers to "regulations of the Franchise Tax Board," or makes similar reference, the reference authorizes the Franchise Tax Board to make rules and regulations as to the subject matter concerning which the reference is made."

6. Revenue and Taxation Code section 18592:

"If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his protest, shall grant the taxpayer or his authorized representatives an oral hearing. The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the protest shall continue to be under protest until the Franchise Tax Board acts on that part."

(The above-quoted code section was in effect at the time the request was filed.)

Revenue and Taxation code section 19044.

"(a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall

grant the taxpayer or his or her authorized representatives an oral hearing.
Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.
[Emphasis added.]

(b) The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the protest shall continue to be under protest until the Franchise Tax Board acts on that part."

The italicized portion was added in 1995, operative July 1, 1997. (This is the Code section which replaced section 18592.)

Despite the exemption from Chapter 4.5 provided above, the FTB is subject to the provision of Government Code section 11435.15 which provides that:

"(a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

. . . Franchise Tax Board . . .

(d) This article applies to an agency listed in subdivision (a) notwithstanding a general provision that this chapter does not apply to some or all of an agency's adjudicative proceedings."

(Amended by Stats.1995, c. 938 (S.B.523), § 87, operative July 1, 1997.)

7. The requester has submitted two separate documents with identical content, but slightly different headings. The first document (two pages in length) is entitled "Protest Hearings Information Sheet," (not labeled) attached to a letter from the FTB dated March 5, 1990. The second document (one page in length) is entitled "Protest Hearings Information Sheet," FTB 1037 (New 1-83) attached to a letter from the FTB dated September 26, 1989. The latter document is attached as Appendix "A."
8. California Regulatory Notice Register ("CRNR") 98, No. 21-Z, May 22, 1998, p. 1021.
9. Government Code section 11342, subdivision (a).
10. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
11. See endnote 6.

12. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251 (see endnote 3: *Grier*, disapproved in part on other grounds in *Tidewater*).
13. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule **either** a rule or standard of general application or a modification or supplement to **such** a rule? [Para.] Second, does the informal rule either implement, interpret, or **make** specific the law enforced by the agency or govern the agency’s procedure?’ (**1987 OAL Determination No. 10**, *supra*, slip op’n., at p. 8.) (See endnote 3: *Grier*, disapproved in part on other grounds in *Tidewater*).

OAL’s wording of the two-part test, drawn from Government Code section 11342, **has** been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.
14. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253 (see endnote 3: *Grier*, disapproved in part on other grounds in *Tidewater*).
15. 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.
16. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.
17. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
18. Revenue and Taxation Code section 19044 (derived from Revenue and Taxation Code section 18592, in effect when this request was filed).
19. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274
20. *Id.*, 275.
21. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 892.
22. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
23. *Id.*, 892.
24. *Id.*
25. Response, p. 1.

26. Revenue and Taxation Code section 21011.
27. For instance, Revenue and Taxation Code section 19044.
28. Revenue and Taxation Code sections 19542-19568.
29. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and which do not* apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
30. **1993 OAL Determination No. 5.** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register (CRNR) 94, Volume 2-Z, January 14, 1994, p. 61 at 105; typewritten version at p. 266. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130. Also see **1998 OAL Determination No. 4**, (Department of Fish and Game, May 22, 1998, Docket No. 90-049), California Regulatory Notice Register 98, Volume 26-Z, p. 1197 and **1998 OAL Determination No. 7**, (Department of Social Services, June 18, 1998, Docket No. 91-001), CRNR 98, Volume 30-Z, p. 1397.

31. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

32. Government Code section 11340.5, subdivision (d) provides that:

“Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be **modified** or set aside. A petition shall be filed with the court within 30 days of the **date the** determination is published.”

33. Pursuant to Title 1, CCR, section 127, this determination shall become effective **on the** 30th day after filing with the Secretary of State. This determination was filed with **the** Secretary of State on the date shown on the first page of this determination.



PROTEST HEARINGS INFORMATION SHEET

GENERAL INFORMATION

The purpose of an oral protest hearing is to give a taxpayer an opportunity to show where the Franchise Tax Board's proposed assessment of additional tax is incorrect. Hearings are scheduled as soon as possible after they are requested, depending on the department's workload and the schedules of the individual hearing officers. Unless otherwise requested, hearings on undocketed protests will normally be scheduled in the Franchise Tax Board's district office nearest to the taxpayer's residence or place of business. Hearings may be conducted on the telephone if agreed to by all parties concerned.

Taxpayers will be given an opportunity to present pertinent information and arguments. However, repetitious discussion of legal or technical points previously covered with a taxpayer or a practitioner or other representative will not be allowed. Unreasonable delays or any other abuse of this administrative review process may result in termination of the hearing, and the hearing officer may issue a report and recommendation based on available information.

CONDUCT OF THE HEARING

A hearing officer will determine the date, time, and location of the hearing and notify the taxpayer or authorized representative. A reasonable attempt will be made to schedule the hearing at a time and location convenient to the taxpayer or representative. The hearing officer will preside over the hearing, determine when it should be terminated and prepare a written report, including a summary of the taxpayer's position and a recommendation as to the correctness of the proposed assessments.

WHO MAY ATTEND

Oral hearings are not public meetings, and, therefore, attendance is limited to the taxpayers, their officers or representatives, witnesses who have pertinent information to present, the hearing officer, and other Franchise Tax Board employees. If seating space is available, the taxpayer may bring observers, but they will not be permitted to participate in the hearing. All persons attending the hearing, whether they actively participate or not, must identify themselves to the satisfaction of the hearing officer. In addition, if persons not normally entitled to confidential information are in attendance the taxpayer, or authorized representative, will be required to sign a statement authorizing the Franchise Tax Board to disclose confidential information during the hearing. The statement and a list of the names of all persons in attendance at the hearing will be made a part of the hearing officer's report and will provide the necessary accounting for the disclosure in accordance with the Franchise Tax Board policy.

Taxpayers' authorized representatives will be required to give their name and the name of their firm or organization. If the taxpayer is not present, the representative will also be required to provide sufficient evidence of authority to represent the taxpayer at the hearing. Evidence may be in the form of a power of attorney (preferably Form FTB 3520), copies of the notices of proposed assessment received by the taxpayer, or a copy of correspondence from the taxpayer or the Franchise Tax Board discussing the protest. In the case of a telephone hearing, reference to any of the aforementioned documents to the satisfaction of the hearing officer will be sufficient.

The taxpayer or the authorized representative of the taxpayer is responsible for the conduct and behavior of all persons attending the hearing on behalf of the taxpayer. In the event of any abusive or disruptive behavior by anyone attending on behalf of the taxpayer, the hearing officer may terminate the hearing and issue a report and recommendation based on available information.

RECORDING OF HEARINGS

Anyone attending a hearing is permitted to make written notes and/or audio recordings of the hearing. Photographing or video recording is not permitted.

REQUESTS TO EXAMINE FILES OR OBTAIN COPIES

All requests to examine Franchise Tax Board files or obtain copies thereof will be acted on as soon as possible in accordance with the Franchise Tax Board policy and existing legal requirements. Copies will not normally be made during a hearing. Fees will be charged for copies in accordance with Franchise Tax Board policy. The physical custody of Franchise Tax Board files will remain with the hearing officer or other authorized Franchise Tax Board employees at all times. Taxpayers or their representatives may make arrangements to examine files in the possession of the hearing officer immediately prior to a hearing. Such arrangements should be made directly with the hearing officer at the time the hearing is scheduled.

EXHIBIT A